



Privatization, Civil Society, Schools, and Human Rights

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PRESENTATION

During the 38th session of the Human Rights Council, OIDEL and the Permanent Mission of Portugal, cohosted a side event on the privatization of education, with the participation of four experts: Ignasi Grau (representative of OIDEL); Louis-Marie Piron (delegate in charge of international relations of the Secretary General of Catholic Education in France); Dr. Maria Smirnova (University of Manchester and expert on education and private actors); and Delphine Dorsi (Executive Coordinator of Right to Education Initiative). The event was moderated by Nuno Cabral, the Permanent Representative of Portugal.

The purpose of the event was to discuss and address the challenges of the privatization of education, to distinguish the different actors involved, and to propose solutions from a human rights perspective.

Human Rights Considerations to Tackle Privatization Respecting Freedom of Education¹

Ignasi Grau i Callizo

The question of education's privatization began during the 80's and 90's when international financial institutions asked developing countries for cuts, in all services (including education), for structural adjustments. This event, together with problems of poverty and lack of accountability, was a



wake-up call for for-profit educational institutions to make profit at the expenses of the African market especially. In such a scenario, many states are neglecting their international obligations to fulfil the right to education. One of the worst situations is the one in Liberia, where the government announced in 2016 its intention to completely outsource public primary education.

Since 2005 many civil society actors and the UN agencies have warned about the dangers of this trend. The Special Rapporteur on the right to education has pointed some of the threats: an increasing risk of abusive practices of these for-profit schools, the marginalization of certain groups that are unable to pay the fees, the lack of schools of good quality (due to the lack of well trained teachers), and the lack of recognition of the academic degrees obtained. This complex phenomenon has been called privatization.

¹ This intervention is a summary of the article "Human Rights Considerations to Tackle Privatization: Respecting Freedom of Education" by Ignasi Grau.

Nevertheless, what is exactly privatization? There is no internationally agreed definition. The topic has been addressed by the Special Rapporteur on the right to education, Kishore Singh, in three different reports: Protecting the right to education against commercialization (A/HRC/29/30); Report of the Special Rapporteur on the right to education on the growth of private education providers (A/69/402); and the Report of the Special Rapporteur on the right to education on public-private partnerships in education (A/70/342). However, we can find no definition of privatization in them. In the academia, there is not either a unanimous consensus.

Some scholars have tried to separate the phenomenon of privatization from the one of commercialization of education. One popular definition that we can use for the latter one is “the process by which education sector is increasingly being opened up to



profit-making and trade, and to agenda setting by private, commercial interests that conceptualizes the learner as a consumer and education as a consumer good” (Macpherson, Robertson, & Walford, 2014). Therefore, we can perceive that privatization does not necessarily amounts to commercialization, but with no agreed international definition, it is difficult to make distinctions.

The international community is facing several problems on this regard. No resolution of human rights has mentioned the word privatization, but some of them have included the word commercialization (without setting a definition). However, the international community in resolutions of 2015, 2016, and 2017 has called for more research and awareness raising on this topic, in order to better understand it and combat it.

It is important to notice that the lack of agreement on the definition can provoke the oversimplification of the issue. It leads especially to two main challenges: (1) to allocate

into the same category actors that have different natures (NGOs, private companies, community-based groups, etc.). In other words, to the reductionism of multiple actors and situations in the educational landscape, which does not capture the diverse nuances, roles, and functions that each entity plays. For instance, the lack of definition can lead to consider that privatization is the same as commercialization, or to think that the dichotomy public/private embraces the whole complex situation. In this mindset, NGOs and community-based groups are perceived as private actors, which might lead to injustices when corporations and NGOs are treated equally. (2) Another challenge is that this situation can take us to consider that the delegation of State functions to non-governmental institutions is an abandonment of a human rights approach to education, which is not always the case.

Therefore, a definition of privatization should rethink the current framing of the private-public categories, in relation to education, because they do not reflect the reality of the actors involved in this field. Some scholars and organizations are researching on this issue. They have acknowledged this classification can be understood in different manners, besides the traditional one of considering public as everything that pertains to the State and private as what belongs to the individual sphere. For example, Professor Pierre Delvolvé proposes to frame these categories of private and public from a functional viewpoint (according to the nature of the functions of the schools); an organic perspective (the sector of activity they perform); or a personal dimension (the nature of the applicable law to the school).

Another good idea to reconsider this terminology of public and private, can be found in UNESCO's document of 2015 "Rethinking Education: Towards a New Paradigm of UNESCO?" which recommends to perceive education as a common good, rather than a "public" good, in order to avoid this current reductionist panorama. These ideas prove that the boundaries which separate the public and private sectors in education are not as clear as we usually think, neither these categories reflect the whole spectrum of social realities on the field.

As in Education 2030, civil society must be involved at all stages in planning and monitoring the right to education, including the elaboration of a national educational policy. There must be a partnership between civil society and the State, which aims at guaranteeing educational alternative offers for all and the right to education in places that the State cannot reach, bearing in mind a common/public good perspective on education (as proposed by the UNESCO).

Regarding the role of the States on these circumstances, it is important to remember that according to the UDHR, their obligations on this field involve respecting parents' rights to decide their children's education, including schools "other than those established by the public authorities". Freedom of education is an essential part of this right, so individuals and educational institutions must enjoy liberty to direct their schools and curricula. They should do it in accordance with the standards provided in General Comment No. 13 of the Committee on Economic, Social, and Cultural Rights, which provides guidance on respecting, protecting, and fulfilling this right, according to the parameters of availability, accessibility, adaptability, and acceptability. Some examples on aspects that need to be regulated by the State, according to these parameters, are the voucher system or an inadequate monitoring system of non-governmental schools.

As a conclusion, the following are some good suggestions for tackling privatization, in order to avoid violating human rights: first, there is a need for a consensual definition, so it can help to frame and address the issue in a better way. Second, the definition should provide space for making distinctions between different non-state actors in international documents, so that each actor can be treated according to its functions and nature, and not to a reductionist public/private paradigm, which does not grasp the nuances. Finally, it is important to focus on the State's obligation to guarantee freedom of education, so this right is actually respected and protected in practice.

You can read more on the following link:

<http://www.oidel.org/wp-content/uploads/2018/07/WP-22.pdf>

The Role of Catholic Education in the Realization of the Right to Education

Louis-Marie Piron

Mr. Piron intervention began with the question: what determines the participation of a school in fulfilling the right to education? There can be different criteria to debate on this topic. It can be according to the legal structure of the school, the level of contribution to the needs of families, the obligations fulfilled in relation to the State, or the project that it proposes and gives to society. We consider that not all these parameters really reflect the level of contribution of a school to the right to education, so we must select the ones that really do it.

It is not strange to think that schools that have a for-profit legal structure are tempted to be at the service of economic profits of their stakeholders, rather than at the service of their students. But for other categories of non-public



schools, whose objective is not a financial one, it is important to identify the criteria that can allow them to be part of the fulfillment of the right to education. Some important aspects are the equal access the school provides to all students, the service provided to society, the fulfilment of official requirements and degrees, and the specific educational project proposed, among others. To measure if parents can pay the fees is also an

important point in order to see if they are suitable for protecting education from a human rights perspective.

The most important criterion is to reflect on the project that is declared and lived by the institution at stake, rather than its legal structure. It is in their project where we can evaluate the pertinence of a specific school. In order to evaluate this issue, it is relevant to acknowledge that a school can have a private structure, but can provide a public service, which is quite different and does not necessarily leads to commercialization. That is the reason why we consider that the focus on the project declared and delivered is more important than its legal regime, because such an approach better reflects a school's contribution to the good of society.

At this point, we might think on what are the necessary characteristics of a Catholic school to contribute to this right and to the good of society? Some standards to keep in mind on this topic are: the national and local utility of Catholic schools in their educational project, the explicit and implicit project that they embrace in relation to the right to education, and their openness to all students. To evaluate these criteria, first of all, it is important to highlight that the role of Catholic education is not to convert people, but to render more human our society. Also, to possess the label of Catholic does not mean *per se* that it contributes to the fulfillment of this right. It is when Catholic schools live according to their project and vocation that they accomplish their mission, because in this manner they become universal and open to the needs of others. It is when Catholic schools collaborate with public authorities that Catholic education plays a relevant role in a human rights perspective. This is an example of how a non-state actor provides an added value to the public functions, and how it can contribute to fulfil State's obligation on the field of education.

In order to illustrate these ideas, the example of the role of Catholic education in France will be used. The situation in this case scenario is not a typical one. In order to analyze the French case (and other cases as well) it is important to bear in mind that each system (private or public) has a specific context and history that allowed its development and

caused the current situation. In France, public education is a pillar of the French nation and history.

After the Second World War, France was not able to provide the educational demands required for all members of society. Consequently, France established a contractual relationship with Catholic schools, so the latter could provide the educational services gap



that the State was unable to fulfill. The legal structure agreed for this purpose was one of a private agent, but as part of a non-profit system, which gave Catholic schools a specific regime different from for-profit education. As part of the contract, and considering the

public service offered, Catholic schools had the obligation to accept all students and to respect the official programs. Also, part of the deal was that the State would provide economic resources and that the schools would have legal personality opposable before the State and other institutions.

For the reasons presented, Catholic education in France provides 20% of the total educational services (more than two million students). Catholic schools contribute in this sense to the fulfillment of the right to education, in the French context, according to their specific nature and structure, even in a country where the policy of *laïcité* is strongly supported. We may conclude that in each case it is relevant to analyze the functions and projects that Catholic schools can provide to each society, depending on the specific circumstances.

Banning Excessive Privatization of Public Education while Ensuring Freedom of Education: Finding the Right Balance

Maria Smirnova

Smirnova's research focuses on how to reconcile the need to reduce the growing excessive privatization of education with the obligation to respect freedom of education of all actors. This risk of an unbalance situation is particularly increasing in developing countries, where the problem is the growing trend to commercialize the right to education. In the international arena, since 2015, the Human Rights Council heard the report of Kishore Sigh, Special Rapporteur in the right to education, concerning the protection of the right to education against commercialization. To cite some examples, in Ghana, the Committee on the Rights of the Child has expressed concerns over the increasing commercialization of education. In Kenya and Uganda, the negative effects of low fee private schools have been judicially condemned. In Chile, the Committee on Economic, Social and Cultural Rights has considered its educational system as one of the most privatized of the world, which causes segregation and discrimination.

In order to address this situation, the international community needs to join efforts. One big step has been the development of the Human Rights Guiding Principles on the obligations of states regarding private actors in education of 2015. These principles have brought together States delegates, lawyers, education practitioners, NGOs, and other stakeholders. It is important to highlight that these Guiding Principles do not create new international standards but apply the already existing obligations concerning the right to education. The aim is to provide a global framework concerning the delivery of education and to solve problems in this field.

Concerning the question of privatization in relation to these principles, we consider that not all private schools should be unanimously condemned. Some private schools provide a balanced alternative to fully accessible free public education. The reduction of the growing privatization of schools should be addressed in terms of tackling commercialization and commodification of education. In this regard, there are three ideas to keep in mind in order to counter excessive privatization without violating the right to freedom of education:



(1) Freedom of education is a recognized international right. International treaties, such as the International Covenant on Economic, Social and Cultural Rights, recognize the right of parents to choose their children's schools, other than those established by public authorities. This is correlated with the right to religious freedom and moral education in conformity with the parents' convictions. Consequently, any instruments addressing excessive privatization must be careful to pay attention to the right to freedom of education and the existing international framework, so all human rights are protected together.

(2) The state has a right to offer full or partial funding to legally established and fully accredited private schools complying with the domestic legislation. Even though States are the ones responsible for fulfilling their international human rights obligations, there is a possibility of offering financial support to legally operative private schools which help to accomplish educational purposes (considering the needs of each society). This is also recognized by international norms (article 28 of the International Convention on the Rights of the Child), as well as national legislation and practices.

(3) The use of consistent terminology with existing human rights instruments will increase the chances of compliance. For instance, the Ruggie Principles on business and human rights of 2001, contain some provisions regarding the prevention of abuses and commercialization of education, in relation to business enterprises. The definition of “business enterprises” is too broad, so private schools clearly fit the terminology. The complementary approach between different regimes can help to better fulfill the right to education and to benefit all actors involved.

In conclusion, the Guiding Principles can be a useful asset for regulating the activity of private actors in education. The process of drafting should be based on the presumption of a balanced, non-biased solution. Such a solution must be rooted on international law, both in its terminology and its substance. Also, it should address and consider the needs of all different stakeholders, particularly of legally operating private schools. This type of institutions must remain within the guarantees provided by the international framework on the right to education, existing practices, and the internal legislation of each State; and should have the right to access public funding.

Therefore, the drafting of these principles must involve the active participation and consultation of private schools. This approach would ensure that the diversity of private schools is reflected in the outcome and also that schools themselves would feel part of the international process aimed at mainstreaming human rights in education. Such a process can help to clarify States’ obligations *vis-à-vis* private actors, and to respect both freedom of education and the rights of students to free and quality education.

Human Rights Guiding Principles on States' Obligations with regards to Private Actors in Education

Delphine Dorsi

The privatization of education is a phenomenon that can be perceived all around the world. In order to address this problem, the focus will be on a human rights approach. In this sense, it is important to notice that there are 168 States Parties to the International Covenant on Economic, Social, and Cultural Rights and 196 to the International Convention on the Rights of the Child.



Considering the abovementioned, it is necessary to keep in mind two dimensions that must be taken into account in every human rights interpretation and implementation: equality and freedom. The materialization of the right to education must be based on fulfilling these two concepts. The first dimension refers to equal entitlements to all individuals regarding the access to education. It also includes the fulfilment of this right without discrimination and to a quality education. The freedom element is related to parents' liberty to choose their children's education, which can be in the public system or in any other school. It also refers to private actors' right to establish and direct their own educational institutions. It can be perceived that the challenge of privatization of education is to find the right balance

between these two dimensions. It should be kept in mind that both of them have different weights and scopes.

Turning to the human rights balancing exercise, the challenges and benefits involved in the said dimensions must be weight for the sake of plurality in education. Regarding the former one, the problems are that fees of private institutions might make education inaccessible, there can be poor learning conditions, a business control of the content and data provided in education, a lack of transparency and respect for domestic law (including labor law), and segregation within different sectors of society. On the side of the benefits, freedom of education can provide less absenteeism of teachers, improved learning outcomes, better efficiency of resources, and to increase the options for choosing schools. This balancing exercise, must reach a point where the benefits are kept and the challenges/problems reduced to their minimum. That should be the core human rights protection of the right to education.

On the conditions of growth of these private actors in education, we must be careful that the participation of these stakeholders does not lead to discrimination, nor to the creation of a system where fee-charging schools are the only available option. It is also important to create the appropriate conditions so the humanistic mission of education is not undermined, there is a respect for the minimum standards of education, and the decisions adopted on this realm are publicly debated with the participation of all the stakeholders involved.

A good instrument for understanding and clarifying the legal relationship between States and private actors in education are the Guiding Principles mentioned by Maria Smirnova. First of all, it is fair to remember that these principles do not create new international obligations, they just clarify the already existing ones (especially regarding specific groups or situations) providing an authoritative interpretation. The aims of these principles are to set standards and provide a normative framework to inform debates, to provide guidance to States in addressing these issues, and to give a framework that can be used for further debates in academia and in the civil society. All different stakeholders are encouraged to

use the Guiding Principles and contribute to the discussions, so all positions and interests are equally represented.

On the other hand, the debate is also important in order to determine the purpose and functions of education. The aim of education is the theory of change: the purpose is to deliver social justice and to protect human dignity. There are different elements that contribute to this goal. First, there must be an international framework which we can rely on, with its normative authoritative interpretation. Consensus is a key component of this process, so all different actors can engage into a common objective and we can understand each other. Some activities are necessary to supervise the process and outcomes, like an active monitoring and effective accountability system, to mobilize and raise awareness among civil society, and to facilitate research to reflect on these issues and contribute to further discussions.



Turning to the drafting process of the Guiding Principles, it has included four main inputs: research provided by countries (case studies and empirical information), research of experts on education, general consultations (national, regional, and international levels; and with different stakeholders), and the conceptual scope of freedom and equality of education (background papers on the scope of the main concepts). The initial draft was ready in 2016, an expert group was created in April-June 2018, and we are expecting the

launching and disseminations of the principles in 2019. The experts committee counts with the participation of people coming from different background: UN staff, independent experts, professors, etc.

There is a growing expectation that the final output would be an international document which reflects a legal commentary on international human rights obligations in relation to private actors in education. We hope the document will include a series of short explanations accessible to all various audiences, together with a general framework and research questions/indicators useful for further development of the Guiding Principles.

Some of the main provisions of these principles related to today's topic include: the liberty of private actors to implement a private school system, but without supplanting or replacing the public one; and the importance of taking measures to provide free and quality education in States where private education has historically filled a gap. Also States have the responsibility of ensuring that private actors do not interfere with the enjoyment of quality free education without discrimination for all.



Some situations on which it is consider that the private actor is interfering with the right to education are the following: when they infringe their obligations of non-discrimination, when they impair State's capacity to deliver free quality education,

when their activities lead to the commercialization of education, when they undermine the public interest, and when their activities amount to retrogressive measures in terms of international human rights standards. In this regard, States are required to monitor and regulate the activity of private actors to ensure transparency and accountability in education.

In order to better fulfil this right, the Guiding Principles set some minimum standards. For instance, States are required to put into place some minimum educational standards, defined through a participatory process. With regard to private actors, the minimum States' obligations are: to govern and monitor the operations of these actors, to supervise the status and working conditions of teachers (including their training and all labor rights), to revise the curriculum that would be used, to control the conditions for suspension and expulsion of students, to set the standards for infrastructure, health conditions, and safety; to control the prohibition of corporal punishment, to monitor their activities in relation to privacy and the protection of data, and to comply with the maximum acceptable learner/teacher ratio.

You can read more on the following link:

<http://globalinitiative-escr.org/advocacy/privatization-in-education-research-initiative/human-rights-guiding-principles-on-the-obligations-of-states-regarding-private-actors-in-education/>

